

**BEFORE THE COMMISSION
ON COMMON OWNERSHIP COMMUNITIES
MONTGOMERY COUNTY, MARYLAND**

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|------------------------------|---|----------------------|
| TONY NGO, |) | |
| |) | |
| Complainant |) | |
| |) | |
| vs |) | |
| |) | |
| CHURCHILL EAST VILLAGE |) | |
| COMMUNITY ASSOCIATION, INC., |) | |
| |) | |
| Respondent; |) | Consolidated Cases |
| |) | Nos. 503-O and 525-G |
| |) | |
| CHURCHILL EAST VILLAGE |) | October 31, 2001 |
| COMMUNITY ASSOCIATION, INC., |) | |
| |) | |
| Complainant |) | |
| |) | |
| vs |) | |
| |) | |
| NAREN and LATA SAMPAT, |) | |
| |) | |
| Respondent. |) | |

DECISION AND ORDER

The above-entitled case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to Sections 10B-5(I), 10B9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended, and the Commission having considered the testimony and other evidence of record, it is therefore this 28th day of September, 2001, found, determined and ordered as follows:

BACKGROUND

The Sampats have lived and fed birds at their current residence for over 15 years. Mr. Ngo moved into the Churchill East Village Community Association, Inc. (Churchill East) community more recently and lives behind the Sampat residence. Mr. Ngo found the number of birds attracted by the Sampats' feeding to be excessive and was concerned by the volume of bird droppings resulting from the feedings. These concerns led Mr. Ngo to raise the issue with the

Churchill East Board of Directors.¹ In February 2000, Churchill East issued a Notice of Hearing to the Sampats informing them of the hearing scheduled for February 22, 2000, to address the bird feeding and two other alleged violations.

In response to the Notice of Hearing, Mr. Sampat, by a letter dated February 22, 2000, discussed his bird feeding as being an extension of his beliefs as a devout Hindu. He further mentioned that "there have been at least two petitions and numerous complaints to at least three county departments and to the Board of Directors" each without any action being taken against him. Case File at 150.

Churchill East held the hearing on February 22, 2000. Mr. Sampat did not attend. On February 24, 2000, Churchill East issued a Notice of Hearing Results which included the following:

The bird feeders are a nuisance to the surrounding properties and the Board directs that all bird feeders are to be removed immediately, with the exception of one (1) reasonably sized bird feeder placed on the deck. The Board will monitor the area and take whatever additional measures are available to them if the additional bird feeders are not removed and the nuisance continues.

Case File at 148. Mr. Sampat did not remove the bird feeder and Churchill East did not commence any enforcement.

In November 2000, Mr. Ngo filed a complaint against Churchill East with the Commission seeking to have the Board of Directors "establish a written by-law or regulation prohibiting the mass feeding of birds and wildlife in this community." Case File at 4. The Commission accepted jurisdiction in Tony Ngo vs Churchill East Village Community

¹ At the same time Mr. Ngo complained to the Board about the bird feeding issue, he also registered dissatisfaction with the Board concerning budgeting and other issues. Mr. Ngo's complaint filed with the Commission raised issues concerning elections, conduct of meetings, access to Association records, and the adoption of the budget. All issues except the bird feeding issue were resolved prior to the Commission accepting jurisdiction and, therefore, are not before the panel.

Association, Inc., Case No. 503-O, and on March 21, 2001, a hearing was held in this matter.² Numerous residents of Churchill East, including Mr. Sampat, testified at the hearing. The panel concluded that in order to completely resolve the issue of bird feeding Mr. Sampat was a necessary party to the proceedings. The Panel Chair issued a verbal order making Mr. Sampat, a third-party respondent.

After consultation with the Commission's professional staff and the County Attorney, the Panel Chair concluded that, without specific regulation, a third-party action did not exist before the Commission. The Panel Chair withdrew the order making Mr. Sampat a third-party respondent and continued the proceedings "to provide the Association time to bring a complaint against Mr. Sampat, if it so desires, and to allow the Commission to consolidate these actions if it believes appropriate." Case File at 310.

On May 8, 2001, Churchill East filed a complaint against the Sampats with the Commission seeking compliance "with the Association's order contained in the Notice of hearing [sic] Results dated February 24, 2000 and remove all bird feeders with the exception of one reasonably sized bird feeder." Case File at 194. On June 18, 2001, Churchill East promulgated the Rules and Regulations Regarding Bird Feeders. These rules allow each homeowner to have "no more than two bird feeders." The first bird feeder shall not "have a surface feeding space that is larger than one square foot and said feeding space may not exceed four inches high." A second bird feeder, if present "shall be of the tube type variety." Respondent's Exhibit 20.

At its meeting of July 11, 2001, the Commission accepted jurisdiction in Churchill East Village Community Association, Inc., vs Naren and Lata Sampat, Case No 525-G, and, because both case arise from the same set of facts, the Commission consolidated this case with Tony Ngo vs Churchill East Village Community Association, Inc., Case No. 503-O. A hearing on the consolidated cases was held on September 12, 2001.

FINDINGS OF FACT

1. Tony Ngo, complainant, is a homeowner residing at 13309 Country Ridge Drive, Germantown, MD 20874. This residence is located in the Churchill East Village

² Commissioner Wertlieb was unable to attend this hearing. Mr. Ngo and Churchill East agreed to proceed with the hearing allowing Mr. Wertlieb to review the record to participate in the decision, if necessary.

Community Association, Inc.

2. The Churchill East Village Community Association, Inc. is a townhome community located in Germantown, Maryland. The community is governed by Articles of Incorporation, Bylaws, and a Declaration of Covenants, Conditions and Restrictions. The relevant provisions of the Declaration that govern this dispute are Article 7, Section 7.
3. Naren and Lata Sampat, respondents, are homeowners residing at 13273 Country Ridge Drive, Germantown, MD 20874. This residence is located in the Churchill East Village Community Association, Inc.
4. The Sampats feed birds on the deck of their townhome. On this deck sits a platform feeder, constructed by Mr. Sampat, whose dimensions are approximately two feet by three feet. The Sampats place commercially purchased bird seed plus loaves of bread on this platform as feed for the birds, squirrels and other animals.
5. Testimony from Mr. Ngo and other residents of Churchill East, indicated that Mr. Sampat's bird feeding attracts a significant number of birds, including numerous large sized birds such as raven. Testimony also indicated that the bird feed attracted squirrels and other small animals.
6. Photographs entered into the record, and testimony of witnesses, demonstrate the presence of bird droppings in yards near Mr. Sampat's residence in an amount greater than would be there if Mr. Sampat did not attract the number of birds and other animals lured by his bird feeding.

CONCLUSIONS OF LAW

1. The Churchill East Village Community Association, Inc. Declaration of Covenants, Conditions And Restrictions is a valid and enforceable document. Markey, et al. v. Wolf, et al., 607 A.2d 82, 87 (Md. 1992).
2. A Homeowners Association derives its powers from its Declaration of Covenants, Conditions and Restrictions. Oakhampton Association, Inc. v. Reeve, et al., 637 A.2d 879, 884 (Md. App. 1994) citing Uniformed Planned Community Act (U.L.A. 1980) (prefatory note).

3. Article VII, Section 7, Prohibited Uses and Nuisances, defines activities, both in specific terms and general terms, which are not allowed in Churchill East. Article VII, Section 7(a) generally prohibits anything "which may be or become an annoyance or nuisance to the neighborhood or other members."
4. Credible testimony by neighbors of Mr. Sampat indicated that bird droppings attributable to birds attracted to Mr. Sampat's bird feeder make use of yards and decks, as well as children's toys and other furniture contained therein, inconvenient and unpleasant.

DISCUSSION

Mr. Ngo's Claim Against Churchill East

Mr. Ngo's complaint against Churchill East listed numerous allegations for which he sought redress. Prior to the March 21, 2001 hearing, Mr. Ngo and Churchill East resolved all the questions except his issue with Mr. Sampat feeding birds. The complaint form asks the complainant, in this case Mr. Ngo, to "[s]tate what actions will resolve your complaint." His response, in total, was:

The elected or appointed President and Board of Directors needs to act upon the desires of the homeowners that they represent. The Board should not represent the employed Management (?) [sic] Company. A vote needs to be taken by the board, as requested by an affected group of homeowners, to establish a written by-law or regulation prohibiting the mass feeding of birds and wildlife in this community, due to the aforementioned reasons.

Case File at 4. On June 18, 2001, Mr Ngo's request was granted when the Board implemented the Rules and Regulations Regarding Bird Feeders. Therefore, there is no issue remaining, between Mr. Ngo and Churchill East, for this panel to decide.

Mr. Ngo, both in his complaint to the commission and in a letter dated September 17, 2001, requested an award of the \$50.00 filing fee. While Mr. Ngo prevailed in his position, by getting Churchill East to promulgate the requested rule, that alone is not sufficient grounds to award costs. Churchill East was well within its authority to issue the rule on feeding birds; and,

it was equally within its authority to decline to issue the rule. The law of Maryland is clear that adjudicative bodies will not interfere in the "business judgment" of association Boards of Directors, absent fraud or bad faith. Black v. Fox Hills North Community Association, Inc., 599 A.2d 1228, 1230 (Md. App. 1992). The award of cost "is reserved for the rare and exceptional case." Id. at 1332. Such an award is "intended to reach only intentional misconduct." Id. citing Talley v. Talley, 564 A.2d 777 (1989). There is no evidence of bad faith or misconduct, intentional or otherwise, on the part of Churchill East. Therefore, Mr. Ngo's request for costs is denied.

Churchill East's Claim Against the Sampats

The facts are not in dispute. The Sampats feed birds on the deck of their townhome. Mr. Sampat admits that he has done this for approximately 15 years. Churchill East is not now, nor ever has, sought to prevent the Sampats from feeding birds in any manner. Rather, the association has sought to limit his bird feeding so that it will not annoy other members of the community. On February 22, 2000, Churchill East held a hearing on the matter. Mr. Sampat did not attend the hearing although he sent a written response.

The Board of Directors found that the Sampats' "bird feeders are a nuisance to the surrounding properties" Based on the following definition of nuisance, we concur.

Nuisance is that activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injustice to right of another, or to the public, and producing such material annoyance, inconvenience and discomfort that the law will presume resulting damage. [citation omitted.] That which annoys and disturbs one in possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. [citation omitted.]

Black's Law Dictionary 961 (5th ed. 1979). The testimony and photographs entered into evidence lead to the conclusion that Mr. Sampat's neighbors were inconvenienced and uncomfortable in the use of their yards and decks, because of Mr. Sampat's method and volume of bird feeding. Therefore, Mr. Sampat's bird feeding is a nuisance.

Churchill East has the authority in its Covenants to prohibit nuisance activity in the

community. Article VII, Section 7(a). Its order to Mr. Sampat to remove all bird feeders except "one(1) reasonably sized bird feeder placed on the deck" was a reasonable exercise of the authority granted to the Board by the Covenants. Mr. Sampat's disregard of that order led to this action. At the hearing before this panel, Mr. Sampat admitted that he still feeds the birds from the same feeder that the Board found unreasonable. He gave no legal justification for his refusal to follow the Board's legally binding order.³

Based on testimony at the hearing, and after an examination of all other evidence in the record, the panel finds that the Sampats' bird feeders are a nuisance to his neighbors. On September 5, 2001, Mr. Sampat filed a request with the commission seeking numerous documents including a transcript of the March 21, 2001 hearing. This request was untimely and, therefore, denied. All other motions and requests before the panel that are not specifically addressed in this decision are denied.

ORDER

In view of the foregoing, and based on the record, for the reasons set forth above, the Commission finds:

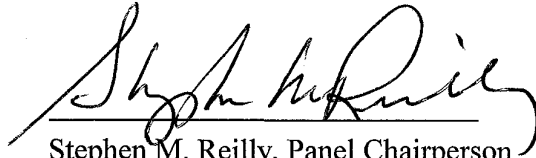
The Sampats' bird feeding is a nuisance to their neighbors. The Churchill East Village Community Association, Inc. Declaration of Covenants, Conditions and Restrictions prohibits any nuisance in the community. Under the Covenants, the Board of Directors rightfully ordered the Sampats to remove the bird feeder but allowed reasonable feeding, thus abating the nuisance. Therefore, the Sampats must remove the current feeder. After the current feeder is removed, the Sampats may feed birds following the

³ At various times, both verbally and in writing, Mr. Sampat indicated that his religious beliefs are the basis of the feeding of the birds and other animals. Additionally, he discussed the pleasure the birds and squirrels give his handicapped son. There is no evidence in the record demonstrating that bird feeding is a tenet of an established religious belief; however, neither the order of the Board of Directors nor this panel will bar Mr. Sampat from continuing to feed the birds and addressing these two important needs. However, both the Board and this panel require him to limit these bird feeding activities so that they are not a nuisance to his neighbors.

guidance in Rules and Regulations Regarding Bird Feeders.⁴ Each party is responsible for his/its own attorney fees and other costs associated with this action.

The foregoing was concurred in by panel members Price, Wertlieb and Reilly.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland within thirty (30) days from the date of this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.

A handwritten signature in black ink, appearing to read "Stephen M. Reilly", is written over a horizontal line.

Stephen M. Reilly, Panel Chairperson
Commission on Common Ownership
Communities

⁴ Churchill East adopted the Rules and Regulations Regarding Bird Feeders after filing the complaint against the Sampats. While Churchill East's February 24, 2000 order to the Sampats and their request to the Commission as outlined in the complaint, sought to limit the Sampats to "one reasonably sized bird feeder," the new rules indicate what the community currently finds acceptable.